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Modifying the Religious Land Use and Institutionalized Persons Act to Create a Constitutional Statutory Protection for Religious Landowners

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COMMENT

MODIFYING THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT TO CREATE A CONSTITUTIONAL STATUTORY PROTECTION FOR RELIGIOUS LANDOWNERS

Your home sits in a residential zone where a special-use permit is required for certain activities. A neighbor seeks to lease his home to a residential drug and alcohol rehabilitation center of which he is the president. The center would house more than ten residents, most of whom are recovering drug addicts or alcoholics with criminal records; in order to house this number of unrelated persons, a special-use permit is required. Your neighbors have voiced concerns about the compatibility of the center with the residential character of the area and the perceived threat to neighborhood safety. When your local planning commission ultimately denies the permit based on compatibility concerns, you are relieved.

However, soon the commission is taken to court under a federal statute that gives religious organizations special rights in land-use disputes—yes, the president of the center refers to it as a "Christian discipleship program"—so you may soon have new neighbors.[1]

Now consider the purchase of a building near your home by an Orthodox Jewish congregation consisting of less than forty members who propose to meet there for Saturday services. They too need a

[1] This hypothetical is based on *Men of Destiny Ministries, Inc. v. Osceola County*, No. 6:06-cv-624-Orl-31DAB, 2006 WL 3219321, at *1, *5 (M.D. Fla. Nov. 6, 2006) (holding, after a bench trial, that since other locations or methods—i.e., housing less residents—are reasonably available there is no "substantial burden" and therefore no cause of action under RLUIPA).

special-use permit from the local board, because all religious organizations seeking to locate in the town must receive such a permit; they too are denied. The board's reason for the initial denial is insufficient parking and its reason for the second denial, after the congregation modifies the plan to include more parking spaces, is traffic congestion. The board stands by this reasoning even though it is repeatedly reminded that Orthodox Jews do not drive on Saturday, the day they will be gathering in the building to worship. The congregation, too, may be eligible for relief under the federal statute protecting religious landowners.[2]

These two scenarios illustrate why the passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[3]—particularly the provisions pertaining to land-use—has generated so much controversy.[4] While some scholars argue that it gives religious organizations an unconstitutional legal weapon in land-use disputes,[5] others promote it as a long-overdue mechanism to place religious organizations on a level playing field with other landowners.[6] This Comment assesses these arguments and ultimately concludes that, in enacting RLUIPA, Congress exceeded its Fourteenth Amendment enforcement power. However, unlike some commentaries on the subject, this Comment will not suggest that RLUIPA is fatally flawed—rather, this Comment will propose modifications that would render RLUIPA constitutional under Congress's enforcement power.

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[2] This hypothetical is based on *Orthodox Minyan of Elkins Park v. Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772, 774 (Pa. Commw. Ct. 1989) (holding, prior to the enactment of the federal statute, that zoning board did not have a sufficient basis for denying the permit).

[3] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2006).

[4] Many commentators have argued that the Act is constitutional. *See, e.g.*, Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001); Michael Paisner, Note, Boerne *Supremacy: Congressional Responses to* City of Boerne v. Flores *and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537 (2005). Other commentators, however, have condemned the Act as unconstitutional. *See, e.g.*, Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 345–46 (2003); Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 Seattle U. L. REV. 805, 834 (2006) (arguing that RLUIPA virtually exempts religious organizations from zoning laws).

[5] *See, e.g.*, James L. Noles, Jr., *Can Historic Preservation Coexist with Protections for Religious Land Uses?*, 17 NAT. RESOURCES & ENV'T 89, 89 (2002) (noting that RLUIPA was "enacted with the putative purpose of defending religious freedom [but] is increasingly being used as an offensive weapon for churches and religious organizations in battles against land use regulation").

[6] *See, e.g.*, Storzer & Picarello, *supra* note 4, at 977 (arguing that RLUIPA protections "were sorely needed, because the very constitutional standards they restate have been violated frequently and nationwide").

This Comment will not consider the constitutionality of RLUIPA's land-use provisions under the Spending and Commerce Clauses.[7]

Part I will provide background regarding Free Exercise Clause jurisprudence, RLUIPA's legislative history, and Congress's enforcement power, one basis Congress claimed as giving it authority to enact RLUIPA and its unconstitutional predecessor,[8] the Religious Freedom Restoration Act ("RFRA").[9] Part II will argue that enactment of RLUIPA was outside Congress's Fourteenth Amendment enforcement power. Specifically, it will consider whether RLUIPA codifies Supreme Court precedent and whether the Act is "congruent and proportional" to the harm it seeks to remedy. Part II will ultimately conclude that neither of these tests is met. Part III will argue that some statutory protection is necessary for those seeking to use land for religious purposes and will suggest how RLUIPA may be modified so as to provide this protection while remaining within the confines of the enforcement power.

I. BACKGROUND

A. Free Exercise Clause Jurisprudence

"Congress shall make no law . . . prohibiting the free exercise [of religion]."[10] The Supreme Court first interpreted the clause in 1879.[11] Until the 1960s, the Court generally did not require that the government exempt persons engaging in religious conduct from adhering to laws enacted to promote safety and welfare.[12] Furthermore, Free Exercise claims were often coupled with other constitutional claims enabling the Court to decide cases on alternative

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[7] Congress claimed authority to enact RLUIPA under its enforcement power as well as the Commerce and Spending Clauses. *See* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Government*, 40 URB. LAW. 195, app. (2008); *see also infra* note 36 and accompanying text (briefly discussing the clauses as they relate to RLUIPA).

[8] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding RFRA is unconstitutional as enactment was not within Congress's enforcement power).

[9] Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[10] U.S. CONST. amend. I.

[11] Reynolds v. United States, 98 U.S. 145 (1879) (upholding the conviction of a Mormon for practicing polygamy and rejecting defendant's argument that laws forbidding polygamy violate the Free Exercise Clause).

[12] *See, e.g.*, Braunfield v. Brown, 366 U.S. 599, 603 (1961) (upholding state Sunday closing law as applied to Orthodox Jews on the grounds that such laws are reasonably related to "improving the health, safety, morals and general well-being of . . . citizens."); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding a state statute requiring license for parade/procession as applied to a religious organization on the grounds that a municipality has the authority to assure the safety and convenience of persons using public streets).

grounds—for example, the Court overturned city ordinances requiring permits to distribute literature on public streets on freedom of speech and press grounds, rather than on Free Exercise grounds even though those convicted of violating the ordinances had been distributing religious literature.[13] Thus, the extent of the clause's protections remained unclear.

However, in 1963, the Court established the first major exception for religious activity; the Court held that in certain circumstances, those engaging in religious activity need not adhere to certain public safety and welfare laws. In doing so, the Court clarified the scope of protections provided by the Free Exercise Clause. In *Sherbert v. Verner*,[14] the Court held that a state unemployment compensation law that substantially burdened religious practice violated the Free Exercise Clause because the law did not meet strict scrutiny.[15] Thus, the Court created the *Sherbert* exception, which exempted those engaging in religious activity from adhering to the law in certain circumstances; the exception provides that where a law substantially burdens religious practice, the law must meet strict scrutiny in order to not run afoul of the Free Exercise Clause. Until 1990, the Court continued to apply the *Sherbert* exception.[16] Though arguably the courts employing *Sherbert* did not apply strict scrutiny with the same rigor as in other areas,[17] they did, nonetheless, employ it.

In 1990, the Court imposed a substantial limitation on the *Sherbert* exception. In *Employment Division v. Smith*,[18] the Court held that

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[13] Schneider v. State of New Jersey, 308 U.S. 147, 161 (1939); *see also* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 634–35 (1943) (holding, partially on free speech grounds, that Jehovah's Witness students need not salute the flag or recite the pledge of allegiance).

[14] 374 U.S. 398 (1963).

[15] In this case, the state's Employment Security Commission denied unemployment compensation to an applicant who refused to accept employment that required her to work on Saturday, her day of worship, because the Commission did not consider this reason "good cause" for refusing work. The applicant challenged the "good cause" requirement on Free Exercise Clause grounds. *Id.* at 399–401.

[16] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 219–21 (1972) (holding Amish residents entitled to a *Sherbert* exception from a state requirement that all children attend school because (1) the requirement was not narrowly tailored to meet a compelling state interest and (2) requiring the Amish children to attend school would substantially burden their religious practice).

[17] *See, e.g.*, Robert W. Tuttle, *Regulating Sacred Space: Religious Institutions and Land Use Controls: How Firm a Foundation? Protecting Religious Land Use after* Boerne, 68 GEO. WASH. L. REV. 861, 919 (2000) ("[F]ree exercise cases before *Smith* accepted as compelling a far wider range of governmental interests, including exceptionless participation in social security . . . .")

[18] 494 U.S. 872 (1990). In the case, the state of Oregon denied applicants' request for unemployment benefits on the grounds that the applicants had been fired for ingesting peyote, which constituted disqualifying "misconduct" under the unemployment compensation statute. The applicants challenged the denial on the grounds that ingesting peyote was part of their religious practices, and therefore the state's denial of benefits violated their rights to free

Sherbert does not provide an individual with an exemption from a generally applicable criminal law, even if the law substantially burdens the individual's religion. In other words, the Court limited the *Sherbert* exception by providing that a "neutral and generally applicable" law that substantially burdens religion need not meet strict scrutiny in order to pass constitutional muster. Thus, after *Smith*, the *Sherbert* exception applied to a much narrower class of laws. In the context of the Free Exercise Clause, the strict scrutiny standard only applied to laws that (1) impose a substantial burden on religion *and* (2) are not "neutral and generally applicable." Some suggest that the *Sherbert* exception is further limited to unemployment compensation cases alone.[19] However, circuit courts addressing the issue have declined to so interpret the *Smith* limitation on *Sherbert*.[20]

Though the *Sherbert-Smith* line of cases clarifies the scope of the Free Exercise Clause, the cases prompt additional questions: What constitutes a "neutral and generally applicable" law?;[21] At what point does a burden on religion become "substantial"?;[22] And, finally, what activities involve "religious practice"?[23] As the next section suggests, RLUIPA and its predecessor represent Congress's attempt to answer some of these questions.

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exercise. *Id.* at 874.

[19] *See, e.g.*, *Smith*, 494 U.S. at 883 ("We [the Court] have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. . . . In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all."); John P. Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U. PA. J. CONST. L. 209, 230 (2006) (stating courts have generally held that *Smith* limited the *Sherbert* exception to unemployment compensation cases).

[20] *See, e.g.*, Mount Elliot Cemetery v. City of Troy, 171 F.3d 398 (6th. Cir. 1998) (considering whether the challenged law was neutral and generally applicable in determining whether *Sherbert* test applied in spite of the fact that the law did not relate to unemployment compensation); *accord* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991).

[21] For a discussion of the "neutral and generally applicable" standard, see *infra* Part II.A (considering whether land-use laws are inherently "neutral and generally applicable"); *infra* Part III.B.2 (proposing a scheme by which to evaluate whether a land-use law is "neutral and generally applicable").

[22] For a discussion of what constitutes a substantial burden on religion, see *infra* Part II.A (discussing different courts' interpretations of what constitutes a substantial burden on religion); *infra* Part III.B.2 (proposing a definition for "substantial burden").

[23] For a discussion of what activities involve "religious practice," see *infra* Part II.A (suggesting that RLUIPA's protection of "religious exercise" rather than "religious practice" may render it unconstitutional); *infra* Part III.B.2 (proposing a definition of "religious practice").

B. RLUIPA's Legislative History

Congress was displeased with the limitations the *Smith* Court placed on the *Sherbert* exception. In response, it passed Religious Freedom Restoration Act ("RFRA")[24] in 1993. RFRA's explicitly stated purpose was to "restore the compelling interest test as set forth in *Sherbert* . . . and to guarantee its application in *all* cases where free exercise of religion is substantially burdened."[25] Thus, RFRA was Congress's attempt to overrule *Smith*. Under RFRA, the characterization of a law as "neutral and generally applicable" was no longer relevant.[26] Congress justified this position by a finding that, "in . . . *Smith* the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[27]

Less than five years later, the Court declared RFRA unconstitutional in *City of Boerne v. Flores*.[28] The Court held that Congress had exceeded its enforcement power in enacting RFRA.[29] The Court stated: "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."[30] Since Congress's enforcement power is limited to remedial measures and Congress may not use the power to create a substantive change in the law, the Court held RFRA unconstitutional.[31]

Congress's response to *City of Boerne* came in 2000[32] when it passed RLUIPA. RLUIPA varied from RFRA in several significant respects. Its scope was much narrower than its predecessor's—its protections were limited to (1) land-use decisions affecting religion and (2) policies of institutions affecting institutionalized persons'

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[24] Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[25] 42 U.S.C. § 2000bb(b)(1) (2000), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[26] The Act also was not limited to unemployment compensation laws. *See supra* Part I.A (noting that some argue the *Smith* decision limited the compelling interest test to unemployment compensation laws).

[27] 42 U.S.C. § 2000bb(a)(4).

[28] 521 U.S. 507 (1997).

[29] For a discussion of the case in the context of an explanation of Congress's Fourteenth Amendment enforcement powers, see *infra* Part I.C.

[30] *City of Boerne*, 521 U.S. at 532.

[31] See *infra* Part I.C for a full discussion of the *Boerne* Court's reasoning.

[32] RLUIPA's legislative predecessor, the Religious Liberty Protection Act of 1999, was introduced twice, H.R. Res. 1691, 106th Cong. (1999); H.R. Res. 4019, 105th Cong. (1998), but failed to move beyond the Senate Judiciary Committee.

practices of religion.[33] Also, Congress claimed authority to enact RLUIPA under not only its Fourteenth Amendment enforcement powers, but also under the Commerce and Spending Clauses. As this Comment focuses on the validity of the land-use provisions of RLUIPA under the enforcement power, the provisions relating to institutionalized persons and Congress's authority to enact RLUIPA pursuant to the Commerce and Spending Clauses is outside the Comment's scope. Note, however, that the Court has upheld the provisions relating to institutionalized persons;[34] also commentators have argued, and lower courts have held, that the Commerce and Spending Clauses do not justify RLUIPA. This leaves the enforcement power as the only grounds upon which RLUIPA may be constitutionally valid.[35]

The relevant part of RLUIPA, Section Two,[36] deals with land-use decisions affecting religion. It provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person including a religious assembly or institution, unless the government demonstrates that imposition of the burden . . .
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

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[33] 42 U.S.C. §§ 2000cc to cc-1 (2006).

[34] Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that Section 3 of RLUIPA is constitutional).

[35] *See, e.g.*, Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1102 (C.D. Cal. 2003) (holding RLUIPA unconstitutional on the grounds that it exceeds Congress's powers under the Commerce Clause); Hamilton, *supra* note 4, 352, n.170 (2003) (citing *In re Rowland*, no. HC 4172 (Cal. Super. Ct., July 31, 2002) (holding RLUIPA unconstitutional under the Spending and Establishment Clauses)); Lara A. Berwanger, Note, *White Knight? Can the Commerce Clause Save the Religious Land Use and Institutionalized Persons Act?*, 72 FORDHAM L. REV. 2355, 2389–401 (2004) (arguing that RLUIPA is unconstitutional because it exceeds the Commerce Clause); Diane K. Hook, Comment, *The Religious Land Use and Institutionalized Persons Act of 2000: Congress' New Twist on "Speak Softly and Carry a Big Stick"*, 34 URB. LAW. 829, 850 (2002) (arguing that RLUIPA is unconstitutional under the Spending Clause); Evan M. Shapiro, Notes & Comments, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 WASH. L. REV. 1255 (2001) (arguing that Congress exceeded its Commerce Clause authority in enacting RLUIPA).

[36] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a)(1) (2006).

In addition, RLUIPA supplies a definition for "religious exercise."[37] It also provides that where the challenged decision or law does not meet the requirements of the Spending or Commerce Clauses,[38] the action must involve an "individualized assessment."[39]

Thus, though RLUIPA is narrower than RFRA, it has a similar effect in that it seeks to answer some of the questions left open by the *Smith* Court. More specifically, RLUIPA's application of the compelling interest test to land-use decisions demonstrates Congress's understanding that the *Sherbert* exception applies beyond the unemployment compensation field. Its definition of "religious exercise" guides courts in determining what activities are protected by RLUIPA, while its failure to explicitly define substantial burden has created uncertainty.[40] Finally, by requiring an "individualized assessment," Congress has arguably accepted the *Smith* Court's decision to limit application of the *Sherbert* exception to situations involving laws that are not "neutral and generally applicable."[41] Whether the answers RLUIPA provides are consistent with the Court's precedent is fundamental to determining whether the Act is constitutional under the enforcement power.

C. Congress's Section Five Enforcement Power in the Context of RFRA

The Court has described the enforcement power as encompassing:

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[37] *Id.* § 2000cc-5(7)(A) (defining religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"); *see also id.* § 2000cc-5(7)(B) (explicitly including the "use, building, or conversion" of realty in the definition of religious exercise).

[38] Essentially, RLUIPA's protections only apply when one of the Act's jurisdictional hooks is satisfied. Two of the Act's jurisdictional hooks are the Commerce and Spending Clauses; thus, where a burden would affect interstate commerce the Commerce Clause hook is satisfied and where a burden is imposed on a program receiving federal funding, the Spending Clause hook is satisfied. The final basis for the Act is the enforcement power—as discussed at length in this Comment, only burdens resulting from individualized assessments satisfy the enforcement power hook. *See* Salkin & Lavine, *supra* note 7, at 210–11 for further discussion of RLUIPA's jurisdictional hooks.

[39] *Id.* § 2000cc(2)(c); *see also id.* § 2000cc2(a)–(b) (stating that RLUIPA will govern a challenge to a neutral and generally applicable law where the law imposes a substantial burden on religion and the law "is imposed in a program or activity that receives Federal financial assistance" or "affects . . . commerce with foreign nations, among the several States, or with Indian tribes").

[40] For a discussion of the varying definitions courts have assigned to "substantial burden" and a proposal for a more uniform definition, see *infra* Part III.B.2.

[41] Without a definition of "individualized assessment," the Act likely would not be appropriately limited so as to ensure it does not invalidate laws that would be valid under *Smith*. For an argument that RLUIPA expands the scope of the *Sherbert* test even with the "individualized assessment" language, see *infra* Part II.A.1.

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[42]

Given this broad description of Congress's enforcement power under Section Five of the Fourteenth Amendment,[43] it would seem that Congress's power to pass legislation enforcing the Constitution is virtually limitless. However, the Court has distinguished remedial legislation from legislation creating a substantive change in the law, instructing that Congress may only enact remedial legislation under the enforcement power.[44] The Court has further stated that it will defer to Congress's determination that it is acting within its enforcement power. But, where it is unclear whether Congress is creating new law, rather than enacting remedial legislation as permitted by the enforcement power, the law's constitutionality will rest on whether the Court finds that the law is "congruent and proportional" to the harm Congress purports to remedy.[45]

These two guideposts for determining when legislation is substantive—whether the law codifies the Court's precedent and whether the law meets the "congruence and proportionality" test—were crucial to the *Boerne* Court's holding that Congress exceeded its enforcement power by enacting RFRA. That is, the *Boerne* Court concluded that RFRA did not codify Court precedent, and, furthermore, that it was not "congruent and proportional," because the evidence did not establish that governments engage in a widespread practice of using zoning laws to discriminate against religious groups.

The Court found support for its conclusion that RFRA exceeded the protections of the Free Exercise Clause in the congressional debates over RFRA, because members of Congress "criticized the [*Smith*] Court's reasoning, and this disagreement resulted in the

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[42] *Ex parte Virginia*, 100 U.S. 339, 345–46 (1879).

[43] U.S. CONST. amend. XIV, § 5 (granting Congress the "power to enforce, by appropriate legislation, the provisions of this article").

[44] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (stating the enforcement power gives Congress "the power 'to enforce' [a constitutional right], not the power to determine what constitutes a constitutional violation").

[45] *See id.* at 520 (noting that while it is appropriate to give Congress "wide latitude" in acting in accordance with its enforcement power "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end . . . [, without this], legislation may become substantive in operation and effect").

passage of RFRA."[46] Looking to the rule of *Smith*,[47] the *Boerne* Court held that RFRA's requirement that *all* laws imposing substantial burdens on religion meet strict scrutiny was an "attempt [at] a substantive change in constitutional protections"[48] since "[l]aws valid under *Smith* would fail under RFRA."[49] Essentially, the Court recognized a fatal flaw in RFRA—it was inconsistent with the Court's precedent.

The Court also determined that RFRA did not meet the "congruence and proportionality" test because it "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[50] In reaching this conclusion, the Court relied on the deficient legislative record,[51] the absence of limiting mechanisms,[52] and RFRA's "sweeping coverage."[53]

II. CONGRESS EXCEEDED ITS ENFORCEMENT POWER BY ENACTING RLUIPA

The two guideposts for determining when a law is substantive and hence inconsistent with the enforcement power—whether the law codifies the Court's precedent and whether the law meets the "congruence and proportionality" test—show that in enacting RLUIPA, Congress exceeded its Fourteenth Amendment power. However, RLUIPA comes closer to meeting the two tests than RFRA and, therefore, with some modifications, would be appropriate remedial legislation that protects religious organizations while avoiding broad infringement on the rights of local governments to enact and enforce zoning laws.

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[46] *See id.* at 515.

[47] *Smith* held that neutral and generally applicable laws may substantially burden religious practice even if the laws do not meet strict scrutiny. *See* Employment Div. v. Smith, 494 U.S. 884, 885 (1990) ("To make an individual's obligation to obey such a [generally applicable] law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense.").

[48] *City of Boerne*, 521 U.S. at 532.

[49] *Id.* at 534.

[50] *Id.* at 532.

[51] *Id.* at 530–31 (comparing RFRA's legislative record unfavorably to that of the Voting Rights Act).

[52] *Id.* at 532–33 (noting that RFRA has no termination date or mechanism, and is not limited to geographic areas where evidence shows land-use laws are frequently used as a pretext for discrimination against religious groups).

[53] *Id.* (noting that the Act "ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter").

A. RLUIPA Does Not Codify Supreme Court Precedent Because It Expands the Scope of Laws that are Subject to Strict Scrutiny

RLUIPA's proponents claim that the Act merely codifies the *Smith-Sherbert* line of cases.[54] However, close analysis of the statute and Free Exercise Clause jurisprudence demonstrates that RLUIPA exceeds the Court's interpretation of the clause. Specifically, RLUIPA does not limit strict scrutiny review to laws that (1) assess an individual's motivation for his actions[55] and (2) substantially burden his religious *practice*. Rather, RLUIPA expands strict scrutiny review to include laws that (1) assess an individual's use of her property and (2) substantially burden her religious *exercise*.

1. The Court Has Not Applied Strict Scrutiny to Laws Assessing Propriety of Land Use

Some commentators argue that zoning laws are inherently "neutral and generally applicable."[56] According to this argument, RLUIPA fails because applying strict scrutiny to such laws directly contravenes the rule the Court announced in *Smith*, that laws substantially burdening religion need not meet strict scrutiny if they are "neutral and generally applicable."[57]

However, such an extreme view of zoning laws is not necessary to conclude that RLUIPA is not a mere codification of the Court's precedent. Though the Court has never precisely defined what constitutes a "neutral and generally applicable law,"[58] a review of *Sherbert* makes it clear that limiting RLUIPA to zoning laws involving "individualized assessments" is not sufficient to ensure the scope of the Act does not expand the scope of the *Sherbert* decision.

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[54] *See, e.g.*, Storzer & Picarello, *supra* note 4, at 979 (arguing that RLUIPA "do[es] little, if anything more, than codify existing First Amendment and Fourteenth Amendment jurisprudence").

[55] For instance, in *Sherbert*, the individual's motivation for her action, refusing work, was her religious belief that working on the Sabbath was not appropriate.

[56] Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361, 2406–07 (May 2002) (noting that the *Smith* Court cited a traffic law as an example of a "neutral and generally applicable" law and arguing "[t]he similarity in procedure between land-use regulations and the traffic law in *Cox* [the case *Smith* Court cited] strongly suggests that the former are also generally applicable despite their system of individualized assessments and thus that they [land-use regulations] do not fit within the *Sherbert* exception").

[57] Employment Div. v. Smith, 494 U.S. 884, 884–85 (1990).

[58] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 543 (1993) ("In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.").

Sherbert and its progeny applied to situations where a law called for an assessment of an individual's motivation for acting. For instance, in *Sherbert* the challenged law called for an assessment of whether an applicant for unemployment compensation had "good cause" for refusing available employment. Likewise, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[59] the Court applied strict scrutiny to the challenged law because it required an assessment of whether killing an animal for religious purposes was "unnecessary."[60]

In contrast, in *Smith* the Court held that the challenged law was not subject to strict scrutiny review even if it substantially burdened religion. That law provided that unemployment compensation was unavailable to applicants who had engaged in work-related misconduct, including drug use. As such, the law did not require an assessment of the individual's motivation for acting—i.e., it did not take into account whether applicants had "good cause" for their "misconduct." Instead, it was an across-the-board prohibition; a law that the Court described as "neutral and generally applicable."

Unlike the laws challenged in *Sherbert* and *Church of Lukumi*, zoning laws do not call for decisions based on landowners' motivations for engaging in certain land use—rather, they require decisions based on whether the land use itself is appropriate. Thus, land-use laws are not covered by the *Sherbert* decision, which called for application of strict scrutiny to only those laws that require individualized determinations about a person's reasons for acting. As such, RLUIPA's application of strict scrutiny to zoning laws does not codify, but actually expands the Court's Free Exercise Clause jurisprudence.

Furthermore, if zoning laws involving "individualized assessments" as defined by RLUIPA are eligible for strict scrutiny protections, then any zoning decision that substantially burdens religion could be eligible for strict scrutiny review. That is, a landowner can easily convert even those laws that proponents of RLUIPA would agree are "neutral and generally applicable" into "individualized assessments." For instance, if an ordinance prohibits buildings over a certain number of stories and a religious organization wishes to build a higher structure, the organization merely needs to

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[59] 508 U.S. 520.

[60] *Id.* at 537 (reasoning that the challenged law is unconstitutional because "it requires an evaluation of the particular justification for the killing [of an animal] . . . [and therefore] represents a system of 'individualized governmental assessment of the reasons for the relevant conduct,' . . . . [As the *Smith* Court held,] in circumstances in which individualized exemptions from a general requirement are available," exemptions imposing a substantial burden must meet strict scrutiny (quoting Employment Div. v. Smith, 494 U.S. 884, 884 (1990))).

apply for a zoning amendment, special exception, or a variance[61] to convert the decision to an "individualized" one.[62] This highlights that the effect of RLUIPA is overly broad,[63] and, therefore, RLUIPA is not a mere codification of the Court's Free Exercise decisions.[64]

2. The Court Has Not Applied Strict Scrutiny to Laws Substantially Burdening Religious Exercise

The argument that RLUIPA codifies Court precedent suffers from an additional flaw. Specifically, the Court has always defined the *Sherbert* exception as applying where a law "forces [an individual] to choose between following the precepts of her religion and forfeiting benefits, on one hand, and abandoning one of the precepts of her religion in order to [receive the benefits], on the other hand."[65] The Court has come to refer to this as a substantial burden on "religions practice."[66]

RLUIPA, on the other hand, provides protection against laws substantially burdening "religious exercise." It gives "religious exercise" a broad definition: "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to a system of religious belief." The definition explicitly includes the "use, building, or conversion" of realty.[67] A comparison of laws the Court has held substantially burden religious practice and those laws courts have held fall under RLUIPA (on the grounds that the laws burden religious exercise) highlights the difference between religious practice and exercise.

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[61] Frank T. Santoro, *Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 WHITTIER L. REV. 493, 516–33 (2002) (explaining the mechanics of zoning laws in the context of Free Exercise).

[62] *See* Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 937 (1998) ("[I]f the 'system of exemptions' caveat to *Smith* is taken seriously, it cuts a potentially large loophole into the *Smith* ruling. Most zoning regimes . . . have a special use permit procedure that allows exemptions, on a case-by-case and individualized basis . . . .").

[63] For further discussion of the broad reach of the Act, see *infra* Part II.B.

[64] *See, e.g.*, Santoro, *supra* note 61, at 513 (noting that *Smith* narrowed the applicability of the *Sherbert* exception); Ariel Graff, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 492 (2005) ("[T]he [*Smith*] Court explained that *Sherbert* stands for [a] limited principle . . . .").

[65] Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[66] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) ("[A] law burdening religious *practice* that is not neutral or not of general application must undergo the most rigorous of scrutiny." (emphasis added)).

[67] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-5(7) (2006).

For example, in *Sherbert* the Court concluded that attending worship services on the Sabbath is religious practice.[68] Attending worship services on a day of obligation is clearly distinguishable from the construction courts have given "religious exercise" under RLUIPA. For example, courts have consistently held that operating a religious school is religious exercise.[69] Furthermore, in one case a religious organization attempting to expand its facility to construct a daycare used RLUIPA to successfully challenge a town's denial of the required permit.[70] More extreme cases have held that religious retreats operated by secular organizations,[71] religious hospitals,[72] and faith-based rehabilitation centers[73] involve religious exercise.

Operating a religious hospital, or even a school, is clearly very different from attending services on the Sabbath—herein lies the difference between religious exercise and religious practice. Since RLUIPA protects religious exercise, instead of the narrower range of activities encompassed by the term religious practice, RLUIPA is not a mere codification of the Court's precedent. RLUIPA thus expands Free Exercise protections beyond the Court's *Sherbert* exception because (1) it covers laws that do not involve an assessment of an individual's motivation for acting and (2) it extends protection beyond religious practice to religious exercise.

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[68] 374 U.S. 398, 403 (1963); *see also* Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 146 (1987) ("Here, as in *Sherbert* and *Thomas*, the State may not force an employee 'to choose between following the precepts of her religion and forfeiting benefits, . . . and abandoning one of the precepts of her religion in order to accept work.'" (quoting *Sherbert*, 374 U.S. at 404)). The Court has also held certain other activities involve religious practice. *See, e.g.*, *Church of the Lukumi*, 508 U.S. at 531 (accepting animal sacrifice as an "integral part" of the Santeria religion, which involves such sacrifices as a principle form of devotion to God); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981) (reasoning that if a Jehovah's Witness has a good-faith belief that his religion forbids participation in the production of armaments, a law requiring that he choose between following that belief or sacrificing a benefit imposes a substantial burden on religious practice).

[69] *See, e.g.*, Living Water Church of God v. Charter Twp. of Meridian, 258 Fed.Appx. 729 (6th. Cir. 2007); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d. Cir. 2007); Castle Hills First Baptist Church v. City of Castle Hills, SA-01-CA-1149-RF, 2004 WL 54792 (W.D. Tex. Mar. 17, 2004).

[70] *Living Water Church of God*, 258 Fed.Appx. 729.

[71] DiLaura v. Twp. of Ann Arbor, 112 Fed. App'x 445 (6th Cir. 2004).

[72] Sisters of St. Francis Health Servs., Inc. v. Morgan County, 397 F. Supp. 2d 1032, 1050 (S.D. Ind. 2005) (suggesting, but not conclusively stating, that a religious hospital involves religious exercise).

[73] Men of Destiny Ministries, Inc. v. Osceola County, No. 6:06-cv-624-Orl-31DAB, 2006 WL 3219321, at *8 (M.D. Fla. Nov. 6, 2006) (reasoning that though a rehabilitation center involved religious exercise, the challenged ordinance did not place a substantial burden on such exercise).

B. RLUIPA Does Not Meet the "Congruence and Proportionality" Test

Even though RLUIPA broadens the *Sherbert* exception, the Act may still be constitutional if the remedy—applying strict scrutiny to land-use regulations that impose a substantial burden on religious exercise—is "congruent and proportional" to the harm the Act seeks to cure.[74] RLUIPA's legislative history indicates that it was intended to prevent the use of zoning laws as a pretext to discriminate against certain religious groups.[75]

To test for congruence and proportionality,[76] the *Boerne* Court examined whether the legislative record established widespread discriminatory practices,[77] and whether the Act was limited to address only demonstrated discrimination.[78] Analyzing these two factors in the context of RLUIPA leads to a conclusion that the Act does not meet the "congruence and proportionality" test. That is, applying strict scrutiny to all land-use decisions and laws that impose a substantial burden on religious exercise is not "congruent and proportional" to the moderate evidence that governments use zoning as a tool to discriminate against religious groups.

RLUIPA's legislative record consists largely of anecdotal evidence[79] that the Court has generally held is insufficient to show the widespread pattern of discrimination required for Congress to invoke its enforcement power.[80] Furthermore, what is absent from the legislative record may be as significant as its contents. Specifically, the record does not contain the testimony of a single land use expert.[81] Additionally, Congress excluded from the record the most scientific study[82] conducted by a neutral party regarding land use data and

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[74] *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . .").

[75] *See* 146 Cong. Rec. S 7774-01 (2001) (Joint Statement of Sens. Hatch and Kennedy on RLUIPA) (noting that discriminatory enforcement of zoning laws is widespread and RLUIPA is needed to address this problem).

[76] See *supra* Part I.C for complete discussion of the Court's application of the congruence and proportionality test to RFRA.

[77] *See City of Boerne*, 521 U.S. at 530–31.

[78] *Id.* at 532–33 (noting that RFRA has no limiting mechanisms and will affect government at every level).

[79] *See* Hamilton, *supra* note 4, at 345–46.

[80] *City of Boerne*, 521 U.S. at 530–32 ("Much of the [legislative record] discussion centered upon anecdotal evidence of autopsies performed on . . . [persons] in violation of their religious beliefs," and, therefore, the record was insufficient.).

[81] *See, e.g.*, Hamilton, *supra* note 4, at 345–46 (noting that such testimony would be highly useful to aid understanding of the legal principles in the field and to analyze the Act's potential impact).

[82] Hamilton, *supra* note 4, at 351 ("By the time RLUIPA was introduced, the most

religious organizations; this study indicated that the use of zoning to discriminate against religious groups was *not* widespread.[83]

Furthermore, even if the legislative record was sufficient to show the necessary widespread discrimination, RLUIPA, like RFRA,[84] is far too sweeping to be "congruent and proportional." First, by its terms it is overly broad. Specifically, the Act's expansive definition of "religious exercise"[85] encompasses many activities and, as the *Boerne* Court noted, claims that a law substantially burdens an individual's religion are generally difficult to contest.[86] Moreover, the very terms of the Act state it "shall be construed in favor of broad protection of religious exercise, to the maximum extent permitted by [the law]."[87]

In addition to its terms, the lack of any limiting mechanism enhances RLUIPA's sweeping effect. For instance, statutes passed under the enforcement power may be limited (so as to be "congruent and proportional") by geographic constraints[88] or by termination provisions.[89] RLUIPA is not so limited. Finally, the "individualized

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scientific study of land use data and churches to date was published in the *Journal of Church and State*.").

[83] Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH AND STATE 335, 341–42 (2000) (stating that only 1 percent of religious organizations seeking a zoning permit were denied and, of this 1 percent, over 83 percent of the organizations were mainstream). These conclusions undermine the congressional record in that Congress suggested that there is widespread use of zoning laws to discriminate against non-mainstream religions. Furthermore, evidence suggesting RLUIPA is disproportionate to the problem of discriminatory zoning laws is conspicuously absent. For example, Congress neglected to include a letter from Mayor Rudolph Giuliani to Congress, which asked that Congress delay the enactment of RLUIPA until cities could assess the impact of the Act. Hamilton, *supra* note 4, at 352.

[84] See *supra* Part I.C for complete discussion of the *Boerne* Court's conclusion that RFRA is not congruent and proportional regardless of the legislative record.

[85] *See* Lennington, *supra* note 4, at 834–35 ("[T]he definition of 'religious exercise' is so broad . . . [that] under RLUIPA, it is unlawful for the government to place a substantial burden on the use of a building . . . [thus] the government *cannot* prohibit a church from building in a certain location.").

[86] *See* City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("'What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith?'" (quoting Employment Div. v. Smith, 494 U.S. 872, 887 (1990))); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 766 (1999) (noting that it is difficult for governments to argue that they have a "compelling" interest in enforcing local zoning codes); Lennington, *supra* note 4, at 834 ("The plain language of the statute [RLUIPA] seems to dictate a result that, if carried to its logical extreme, would give religious institutions a free pass when confronted with local zoning issues.").

[87] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-3(g) (2006).

[88] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966) (reasoning, in part, that the challenged provisions of the Voting Rights Act were permissible because they were limited to geographic regions where evidence demonstrated voting discrimination was most egregious).

[89] *See, e.g., id.* at 331 (reasoning, in part, that the Voting Rights Act provisions were

assessment" limitation does little, if anything, to narrow the scope of the Act. As discussed,[90] a landowner can easily convert the application of any land-use ordinance into an "individualized assessment" by merely applying for a zoning amendment, special exception, or variance. Thus, the "individualized assessment" requirement does not significantly limit the scope of the Act.

Given the limited evidence of widespread use of zoning laws to discriminate against religious organizations, evidence that such laws are not widely used as tools of discrimination, the broad terms of the Act, and the lack of any significant limiting mechanisms within the Act, RLUIPA does not satisfy the "congruence and proportionality" requirement. This failure is further evidence that the Act represents a substantive change in the Free Exercise Clause, and therefore is outside Congress's enforcement power.

III. MODIFYING RLUIPA TO PROVIDE RELIGIOUS GROUPS WITH NECESSARY PROTECTION FROM DISCRIMINATORY ENACTMENT AND ENFORCEMENT OF LAND-USE LAWS

Though the deficient evidence of discriminatory use of zoning laws is inadequate support for the broad reach of RLUIPA, the evidence likely is sufficient to support narrower legislation protecting religious landowners.[91]

A. The Evidence

Part II focused on shortcomings in the legislative record. However, these shortcomings do not necessarily indicate that there are not a significant number of circumstances where governments have unconstitutionally denied religious organizations' land-use proposals. RLUIPA's congressional record contained statistical and anecdotal evidence[92] indicating that there are instances where zoning decisions

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permissible because they had a termination mechanism).

[90] *Supra* Part II.A.1.

[91] *See, e.g.*, J. Jeffery Patterson, *The Long Road Towards Restoration of Religious Freedom: Congressional Options in Light of* City of Boerne v. Flores, 87 KY. L.J. 253, 268 (1999) (noting that Douglas Laycock "supports the concept of another RFRA-like bill based on the enforcement power of the Fourteenth Amendment" and emphasizes that *Boerne* "'does not deprive Congress of all power to protect religious exercise under its power to enforce the Fourteenth Amendment'" (quoting *Congress' Constitutional Role in Protecting Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 9 (1997) (prepared statement of Douglas Laycock))).

[92] Adams, *supra* note 56, at 2375–80 (detailing the anecdotal evidence contained in RLUIPA's record).

are a pretext for discrimination.[93] While this record is not sufficient to support RLUIPA—because RLUIPA requires strict scrutiny review of almost all zoning decisions imposing a substantial burden—the record is likely sufficient support for more moderate legislation.[94]

B. Potential Solutions

Several commentators advocating a view that RLUIPA is unconstitutional have nevertheless recognized the need for statutory protection of religious organizations in the context of zoning decisions. For instance, commentators have proposed applying intermediate scrutiny to zoning laws.[95] Others have proposed constitutional amendments to the effect that no law may substantially burden religion unless the law meets strict scrutiny.[96] While these proposals have their merits, they are overly complex,[97] and therefore a better approach is to modify RLUIPA in a manner such that it would survive a constitutional challenge.

C. The Proposed Solution: Modifying RLUIPA

The fundamental problem with the current language of RLUIPA is that it is overly broad—it prohibits actions that are not barred by the Court's Free Exercise Clause cases and its prohibitions are not "congruent and proportional" to the evidence of discriminatory use of zoning laws. Thus, in order to remedy the statute, its effect must be tempered to prohibit only (1) those actions that the Court has held are

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[93] *See id.* at 2380–82 n.145 (noting that many of the witnesses who testified before Congress cited a Brigham Young University study that stood for the proposition that minority religions are frequently discriminated against in zoning decisions).

[94] This is particularly likely to be true if some of the shortcomings in the record are addressed—i.e., include testimony from land-use experts and address evidence suggesting that there is no need for statutory protection of religious landowners.

[95] *See, e.g.*, Smolla, *supra* note 62, at 937 (proposing application of intermediate scrutiny to "neutral and generally applicable" laws substantially burdening religion after concluding that zoning involves such laws).

[96] *See, e.g.*, Patterson, *supra* note 91, at 271–72.

[97] For instance, the *Boerne* Court implicitly suggested that the RFRA would not be constitutional even if it used intermediate scrutiny. City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("Even assuming RFRA would be interpreted in effect to mandate some lesser test, say, one equivalent to intermediate scrutiny, the statute nevertheless would require . . . . considerable congressional intrusion into the States' traditional prerogatives . . . ."). Likewise, a constitutional amendment is very difficult to achieve, *see* Benjamin C. Zipursky, *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, 83 N.Y.U. L. REV. 1170, 1210 (2008) ("Our Constitution is overwhelmingly difficult to amend."), and such a broad expansion of the Free Exercise Clause is likely to be problematic as a practical matter, *see, e.g.*, *City of Boerne*, 521 U.S. at 534 ("The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.").

violations of the Free Exercise Clause and (2) those actions, not yet held to be violations of the Clause, whose prohibition is "congruent and proportional" to the legislative record regarding discriminatory use of zoning laws.

1. The Proposed Language

The proposed statute ("modified RLUIPA") incorporates some of the language currently in the Act as well as some new language; it would read as follows, with defined terms in quotations:

> No government shall impose or implement a land-use regulation in a manner that imposes a "substantial burden" on the "religious practice" of an individual or an organization if "evidence reasonably suggests" that the burden is a result of discrimination against the religion of the individual or the organization unless the government demonstrates that imposition of the burden:
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

The statute's scope provision would include a definition of "individualized assessment." Modified RLUIPA would also contain a termination provision to ensure it is limited to situations where Free Exercise Clause violations are most likely.[98]

2. The Definitions

a. Substantial Burden

RLUIPA does not provide a definition of "substantial burden." As such, courts have defined the term differently hence creating divergent results.[99] To avoid this problem and to ensure that the modified statute only applies to a limited range of situations (as

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[98] A termination provision goes a long way toward ensuring congruence and proportionality. *See City of Boerne*, 521 U.S. at 532–33 (noting that the termination provision contained in the Voting Rights Act reduced the possibility of overbreadth). Such a provision for RLUIPA would need to be drafted based on the most recent evidence regarding the prevalence of Free Exercise violations, and therefore will not be proposed here.

[99] *See* Salkin & Lavine, *supra* note 7, at app. (summarizing the various formulations of "substantial burden").

required to meet the "congruence and proportionality" test), modified RLUIPA would define "substantial burden" narrowly:

> A "substantial burden" is a burden that either compels conduct in contravention of "religious practice" or makes it impracticable for an individual or organization to adhere to conduct that is required by its "religious practice"; a "substantial burden" must be the result of significant pressure from the government and does not include a mere inconvenience.[100]

With this narrow definition, modified RLUIPA would apply only to circumstances where the religious institution could show it could not operate elsewhere, and the adverse zoning decision was not based on grounds generally attributed to zoning decisions—i.e., traffic and environmental concerns.[101] Thus, the modified statute would apply if a religious institution's request is denied on grounds that are seemingly unrelated to public health or welfare, and the zoning board does not give the organization an opportunity to modify its request to meet the identified shortcomings.[102]

Such a definition of "substantial burden" would ensure that only the narrow class of cases most likely to involve discriminatory use of zoning laws fall under the modified statute. This, in turn, ensures a "congruence and proportionality" between the statute and the legislative record.

b. Religious Practice

"Religious practice" would be defined in a manner consistent with the Court's precedent; the result is a narrower definition than RLUIPA's definition of "religious exercise." The most common

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[100] This definition takes into account the Court's dictate that "'[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'" Employment Div. v. Smith, 494 U.S. 884, 887 (1990) (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

[101] This would achieve results similar to those reached in *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (applying narrow definition of "substantial burden" and reasoning that no such burden was imposed where a religious college was denied a petition for rezoning because there was no evidence that the college could not operate elsewhere, and there was no indication that the city was holding the college to a different standard than it used for non-religious organizations).

[102] This result would be consistent with *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d. Cir. 2007) (applying a relatively narrow definition of "substantial burden" and reasoning that, under such a definition, whether a denial is absolute is "important [as] if there is a reasonable opportunity for the institution to submit a modified application, the denial does not place substantial pressure on it to change its behavior and thus does not constitute a substantial burden").

definition prescribed by the Court is that "religious practice" involves "the observation of a central religious belief or practice."[103] However, this definition may run afoul of the Court's mandate that courts should not inquire into the centrality of certain conduct to any given religion.[104] Therefore, modified RLUIPA would use another test announced by the Court in its Free Exercise Clause jurisprudence:

> Religious practice is any conduct that an adherent believes is mandated by or prohibited by his religion.[105]

Thus, animal sacrifice as part of the Santeria faith[106] would be protected as "religious practice," as would attending worship services. Even using a house of worship to engage in the sacramental ingestion of peyote would be religious practice if the persons so using the land believed their religion mandated such conduct. However, this latter practice, use of an illegal drug, may be limited by other provisions of the proposed statute—specifically, the law against using peyote may be deemed "neutral and generally applicable" and therefore no cause of action under modified RLUIPA would exist because the "individualized assessment" requirement would not be satisfied.

c. Individualized Assessment

RLUIPA does not explicitly define "individualized assessment."[107] Though courts have generally interpreted the "individualized assessment" requirement to mean that RLUIPA does not apply to "neutral and generally applicable" laws, the *Smith* Court failed to explicitly define this limitation,[108] and the Court has done little to clarify the term since.[109] Given this uncertainty, courts have

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[103] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 565 (1993) (quoting *Hernandez*, 490 U.S. at 699).

[104] *See supra* note 100 and accompanying text.

[105] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 404 (1963) (holding that where an individual is forced to forego the precepts of her religion, the individual's religious practice is implicated).

[106] As the Court discussed in *Church of the Lukumi*, 508 U.S. 520.

[107] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a)(2)(C) (2006) (stating RLUIPA will apply where "individualized assessments of the proposed uses for the property involved [are at issue]" but not prescribing what constitutes an individualized assessment).

[108] *Smith*, 494 U.S. at 882–90.

[109] *See, e.g.*, *Church of the Lukumi*, 508 U.S. at 543 ("In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.").

developed divergent views regarding the types of zoning laws to which RLUIPA applies.[110]

In order to clarify this uncertainty and to ensure the statute is "congruent and proportional," modified RLUIPA would contain a constricted definition of "individualized assessment":

> An "individualized assessment" is one that involves a detailed consideration of the specific land-use proposed by the applicant.
>
> This definition does not include "mechanical assessments,"† or situations where an applicant intervenes to convert a "mechanical assessment" into an "individualized" one by applying for a variance, zoning amendment, special exception, or other similar exemption from a "mechanical assessment" ordinance. The exclusion of "mechanical assessments" is subject to two exceptions: (1) where the "mechanical assessment" ordinance has been enacted within the last six months; and (2) where the only means by which the applicant can use any land in the jurisdiction is by seeking an exemption from a "mechanical assessment" ordinance.[111] Where either of these exceptions apply, the "individualized assessment" requirement is satisfied for purposes of the Act.

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[110] Some courts have found that the variance process does not give rise to an individualized assessment, and that zoning laws are neutral and generally applicable. *See, e.g.*, Mount Elliot Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir. 1999) (holding city's decision to deny re-zoning request of operator of Catholic cemetery was neutral and generally applicable); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991) (reasoning that the *Sherbert* exception does not apply to the challenged ordinance that excludes churches from business zones because "[a]bsent evidence of the City's intent to regulate religious worship, the ordinance is properly viewed as a neutral law of general applicability"); Saint Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d. Cir. 1990) (holding that Landmarks Preservation Law from which church sought a variance was neutral and generally applicable despite church's request for variance). However, other courts have found that the individualized consideration inherent in the variance process does create an individualized assessment, precluding a finding that zoning laws are neutral and generally applicable. *See, e.g.*, Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 986 (9th Cir. 2006) (reasoning that since "RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land," the county's denial of a conditional use permit involved an individualized assessment); Freedom Baptist Church of Delaware County v. Twp. of Middletown, 204 F.Supp.2d 857, 868 (E.D. Pa. 2002) (concluding that an application for a use variance involved an "individualized assessment" because "[zoning laws are] of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds").

[111] Exceptions for "mechanical rules" enacted within the last six months and those that prohibit the sought land-use throughout the city are necessary to ensure that RLUIPA prohibits discriminatory enactment of laws.

> † "Mechanical assessments" are those involving no discretion—i.e., those based on the application of completely objective criteria. For example, a "mechanical assessment" occurs when a zoning ordinance prohibits buildings over a certain height within a zone.

This definition is preferable to the state of "individualized assessment" under the current case law, and, like the other proposed definitions, ensures the requisite "congruence and proportionality." It places limits on an applicant's ability to convert any land-use decision into an "individualized" one and limits modified RLUIPA's protections to certain types of zoning laws.[112] As a result, it guarantees strict scrutiny will apply to zoning laws in a manner "congruent and proportional" to the somewhat limited evidence that zoning laws are used as a pretext to engage in discrimination.

d. Evidence Reasonably Suggests

This is the only completely new language modified RLUIPA contains. It is necessary because even the proposed, narrower version of RLUIPA broadens the Court's Free Exercise Clause precedent.[113] Without this additional provision, RLUIPA could overstep the Court's Free Exercise doctrine by supporting a Free Exercise Clause claim that does not include any showing of discrimination. The "evidence reasonably suggests" standard tempers modified RLUIPA and makes it more likely to survive constitutional review. The standard imposes a low burden of proof, akin to probable cause, and would be defined in the proposed statute as:

> Evidence that would reasonably lead a person to conclude that the decision was based on discrimination.

Requiring a plaintiff to demonstrate some minimal evidence of discrimination balances two competing concerns. On one hand, discrimination is often very difficult to show in the context of discretionary decision-making (such as zoning boards' decisions); on the other hand, the Court has never applied a presumption of discrimination based merely on an adverse discretionary decision.[114]

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[112] Thus, the definition corrects courts that have held that land-use decisions and laws are inherently "individualized" such as the court in *Freedom Baptist Church*, 204 F.Supp.2d at 868 ("[Zoning laws are] of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds.").

[113] *See Smith*, 494 U.S. at 884 (questioning whether the *Sherbert* test applies beyond the unemployment compensation field).

[114] *See supra* Part II.A.1 (noting that zoning laws involve an assessment of the propriety of

In essence, the standard is a compromise that furthers modified RLUIPA's dual purpose: to protect religious landowners and to preserve the abilities of local governments to enact and enforce zoning laws.

3. Application—The Practical Effect of Modified RLUIPA

Modified RLUIPA would lead to desirable results, as demonstrated by returning to the hypothetical situations presented at the beginning of this Comment.[115] In the first situation, a residential drug and alcohol rehabilitation center seeks to locate in a residential zone and seeks an exception to the limit on the number of unrelated residents permitted in a single home. The zoning board explicitly bases its denial on compatibility concerns and explicitly denies that the decision was based on the residents' statuses as recovering addicts or on the religious nature of the center.[116] The center likely would not have a cause of action under modified RLUIPA. First, a limitation on the number of residents a building in a certain zone may hold involves a "mechanical assessment." Therefore, unless the challenged ordinance qualified for one of the two exceptions[117] to the general rule that the statute does not cover "mechanical assessments," the center would not be entitled to relief.

Even if the ordinance falls under one of the exceptions, the center is still likely not eligible for protection under modified RLUIPA. There is no indication that a certain number of residents is required to engage in the "Christian discipleship program." In other words, the ordinance does not require members of the center to engage in activities contrary to or prohibit them from engaging in activities required by their religion and therefore does not constitute a burden on religious practice, much less a substantial one. Finally, these facts likely do not "reasonably suggest" discrimination. Thus, the center would have to state a constitutional claim directly. Such a claim would require that the center prove actual discrimination thereby perfecting a Free Exercise Clause claim, or that the center make an

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a proposed land use while *Sherbert* and its progeny provide a religious exemption from laws assessing an individual's motivation for his conduct).

[115] *Supra* intro.

[116] This hypothetical is based on *Men of Destiny Ministries, Inc. v. Osceola County*, No. 6:06-cv-624-Orl-31DAB, 2006 WL 3219321, at *3 (M.D. Fla. Nov. 6, 2006).

[117] That is, unless the ordinance limiting the number of residents was enacted within the last six months or seeking an exemption from the ordinance is the only means by which the center can use any land in the city.

Equal Protection Clause claim by showing that there is no rational basis for the board's decision.

In the second hypothetical discussed at the beginning of the Comment, an Orthodox Jewish congregation sought a special permit to use a building for Saturday services. The zoning board first denied the permit on the grounds that there was a lack of parking spaces; after the congregation modified the proposal to include additional parking spaces and reminded the board that its members would not be driving to Saturday services, the board cited traffic congestion as the grounds for denying the permit.[118]

The congregation would likely have a cause of action under modified RLUIPA. Saturday worship involves religious practice for an Orthodox Jew, because he believes his religion mandates such conduct. Since the zoning board's decisions effect an absolute denial, the decisions place a substantial burden on religious practice. In other words, it is apparent that the congregation has no realistic opportunity to modify the proposal to meet the city's concerns, lack of parking and traffic congestion, because these concerns are mutually exclusive.[119]

There is an "individualized assessment," even though the congregation applied for a special permit, because the situation qualifies for one of the exceptions to the general rule that the statute does not cover "situations where an applicant intervenes to convert a 'mechanical assessment' into an 'individualized' one by applying for a[n] . . . exemption from a 'mechanical assessment' ordinance."[120] Specifically, it qualifies as an "individualized assessment" because all religious organizations seeking to locate in the town must receive a special permit to operate—i.e., "the only means by which the applicant [congregation] can use any land in the jurisdiction [town] is by seeking an exemption from a 'mechanical assessment' ordinance."[121]

Finally, given the probity of the facts already apparent, there is likely "evidence reasonably suggesting" discrimination. Specifically,

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[118] This hypothetical is based on *Orthodox Minyan of Elkins Park v. Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Commw. Ct. 1989) (holding, prior to the enactment of the federal statute, that zoning board did not have a sufficient basis for denying the permit).

[119] This would be consistent with the well-reasoned holding in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d. Cir. 2007) (reasoning that in determining if a substantial burden exists, whether a denial is absolute is "important [as] if there is a reasonable opportunity for the institution to submit a modified application, the denial does not place substantial pressure on it to change its behavior and thus does not constitute a substantial burden").

[120] *Supra* Part III.C.2 (defining "individualized assessment" for purposes of the proposed statute).

[121] *Id.*

the zoning board's multiple denials made it effectively impossible for the congregation to meet the city's requirements. Thus, the facts likely would lead a person to reasonably believe that discrimination has occurred.

CONCLUSION

Congress should not ignore the evidence that local governments are using zoning ordinances to discriminate against religious groups; however, it may not use this evidence as a basis for a far-reaching statute that gives religious organizations a special legal weapon with which to challenge any unfavorable zoning decision. Rather, Congress should pass appropriate, remedial legislation that will protect religious organizations while avoiding broad infringement on the discretion of local governments to enact and enforce zoning laws. This Comment's proposed modifications to RLUIPA do just that. Modified RLUIPA, like RLUIPA, is an expansion of the Court's Free Exercise Clause jurisprudence, but, unlike RLUIPA, it is moderate and therefore more likely to survive the Court's review under the "congruence and proportionality" test.

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